Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

APPENDIX C, pp. 201a-247a
TO PETITION FOR WRIT OF CERTIORARI

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Fed. R. Civ. P., Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery.

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court.

An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or

material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response.

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken.

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or

dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the

reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed]

(g) Failure to Participate in the Framing of a Discovery Plan.

If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Fed. R. Civ. P., Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Fed. Evid. Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c)

not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. Evid. Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. Evid. Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Federal Rules of Appellate Procedure, Rule 47. Rules of a Court of Appeals

(a) Local Rules.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

Local Civil Rule 56.1. Statements of Material Facts on Motion for Summary Judgment

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

(d) Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).

[Source: Former Local Civil Rule 3(g)]

Local Civil Rule 56.2. Notice to Pro Se Litigants Opposing Summary

Any represented party moving for summary judgment against a party proceeding *pro se* shall serve and file as a separate document, together with the papers in support of the motion, a "Notice To Pro Se Litigant Opposing Motion For Summary Judgment" in the form indicated below. Where the

pro se party is not the plaintiff, the movant shall amend the form notice as necessary to reflect that fact.

Notice To Pro Se Litigant Opposing Motion
For Summary Judgment

The defendant in this case has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This means that the defendant has asked the court to decide this case without a trial, based on written materials, including affidavits, submitted in support of the motion. THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION by filing your own sworn affidavits or other papers as required by Rule 56(e). An affidavit is a sworn statement of fact based on personal knowledge that would be admissible in evidence at trial. The full text of Rule 56 is attached.

In short, Rule 56 provides that you may NOT oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising issues of fact for trial. Any witness statements, which may include your own statements, must be in the form of affidavits. You may submit affidavits that were prepared specifically in response to defendant's motion for summary judgment.

Any issue of fact that you wish to raise in opposition to the motion for summary judgment must be supported by affidavits or by other documentary evidence contradicting the facts asserted by the defendant. If you do not respond to the motion for summary judgment on time with affidavits or documentary evidence contradicting the facts asserted by the defendant, the court may accept defendant's factual assertions as true. Judgment may then be entered in defendant's favor without a trial.

If you have any questions, you may direct them to the Pro Se Office.

N.Y. Educ. Law § 6201. Legislative findings and intent

1. The legislature finds that in order to meet the state's responsibility to provide post-secondary education in New York city beyond the associate degree level, as it does elsewhere in the state, there should be full state funding of senior college operating and debt service. The governance of the university must reflect increased state responsibility but should preserve the city's participation in the governance of the university it created and developed at city expense.

2. The legislature intends that the city university of New York should be maintained as an independent system of higher education governed by its own board of trustees responsible for the governance, maintenance and development of both senior and community college units of the city university.

3. The legislature's intent is that the city university be supported as an independent and integrated system of higher education on the assumption that the university will continue to maintain and expand its commitment to academic excellence and to the provision of equal access and opportunity for students, faculty and staff from all ethnic and racial groups and from both sexes.

N.Y. Educ. Law § 6204(1)

The control of the educational work of the city university shall rest solely in the board of trustees which shall govern and administer all educational units of the city university.

N.Y. Educ. Law § 6205 Liability of board of trustees and liability of city university of New York

1. The state shall save harmless and indemnify members of the board of trustees and any duly appointed member of the teaching or supervising staff, officer or employee, and a student serving on a university or college body or committee

which is composed of a majority of faculty, administration and trustees, of the senior colleges under the jurisdiction of such board pursuant to section seventeen of the public officers law against any claim, demand, suit or judgment arising by reason of any act or omission to act by such person occurring in the discharge of his duties and within the scope of his service on behalf of such university.

(e) The city of New York shall indemnify and save harmless employees of the community colleges of the city university in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or settlement arose, occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

Title 47 Administrative Code of the City of New York, Rules of Practice (Commission on Human Rights)

§1-02 Organization of Commission.

In order to carry out its various statutory responsibilities in a fair and impartial fashion, the Commission has separated its functions into discrete bureaus and offices, each of which reports to the Chair of the agency. In addition to the Chair and the Commissioners, the following components of the Commission are directly involved in the enforcement of the HRL:

(a) Law Enforcement Bureau. The Law Enforcement Bureau is charged with the Commission's investigatory and prosecutorial functions. Where an action is authorized or required to be taken by the Law Enforcement Bureau, such action shall be taken by the Deputy Commissioner for Law Enforcement, such Law Enforcement Bureau staff as the

Deputy Commissioner shall designate, or such person as may be appointed by the Chair of the Commission.

(b) Office of General Counsel. The Office of General Counsel serves as counsel to the Chair and to the Commissioners. Where an action is authorized or required to be taken by the Office of General Counsel, such action shall be taken by the General Counsel, such staff of the Office of General Counsel as the General Counsel shall designate, or such person as may be appointed by the Chair of the Commission.

(c) Office of Mediation and Conflict Resolution. The Office of Mediation and Conflict Resolution provides mediation and conciliation services in connection with complaints that have been filed. Where an action is authorized or required to be taken by the Office of Mediation and Conflict Resolution, such action shall be taken by the Deputy Commissioner for Mediation and Conflict Resolution, such staff of the Office of Mediation and Conflict Resolution as the Deputy Commissioner shall designate, or such person as may be appointed by the Chair of the Commission.

§1-34 Availability of Investigatory Materials.

Upon an order of the Law Enforcement Bureau dismissing the complaint, complainant and respondent may examine the factual documentation in the investigatory file.

Subchapter E Determination Of Whether Probable Cause Exists

§1-51 Basis of Determination.

The Law Enforcement Bureau shall find probable cause exists to credit the allegations of a complaint that an unlawful discriminatory practice has been or is being committed by a respondent where a reasonable person, looking at the evidence as a whole, could reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed.

§ 1-52 Notice of Determination.

The Law Enforcement Bureau shall serve a written notice of determination upon complainant and respondent. Determinations which state that probable cause has been found not to exist and that dismiss the complaint shall state the reasons for the Law Enforcement Bureau's conclusion.

§1-53 Review of Determination.

A determination that probable cause exists to credit some or all of the allegations of a complaint that an unlawful discriminatory practice has been or is being committed is not reviewable. A determination that probable cause does not exist to credit some or all of the allegations of a complaint that an unlawful discriminatory practice has been or is being committed, and that the complaint is accordingly dismissed in whole or in part, is reviewable in accordance with subdivision (f) of~1-22 of this Chapter.

Subchapter F Mediation And Conciliation

§1-61 Conciliation Agreements.

The Law Enforcement Bureau, complainant, respondent, and other necessary parties may at any time after the filing of a complaint agree to a conciliated resolution of a complaint.

Administrative Code of the City of New York
Title 8, Chapter 1. Commission on Human Rights

§ 8-103 Commission on human rights.

There is hereby created a commission on human rights. It shall consist of fifteen members, to be appointed by the mayor, one of whom shall be designated by the mayor as its chairperson and shall serve as such at the pleasure of the mayor. The chairperson shall devote his or her entire time to the chairperson's duties and shall not engage in any other occupation, profession or employment. Members other than

the chairperson shall serve without compensation. Of the fifteen members first appointed, five shall be appointed for one year, five for two years and five for three years; thereafter all appointments to the commission shall be for a term of three years. In the event of the death or resignation of any member, his or her successor shall be appointed to serve for the term for which such members had been appointed.

§ 8-105 Powers and duties.

The powers and duties of the commission shall be:

(1) To work together with federal, state and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York, and engage in other anti-discrimination activities.

(2) To enlist the cooperation of various groups, and organizations, [sic]1 in mediation efforts, programs and campaigns devoted to eliminating group prejudice, intolerance, hate crimes bigotry and discrimination.

(3) To study the problems of prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby in all or any fields of human relationship.

(4) (a) To receive, investigate and pass upon complaints and to initiate its own investigations of:

(i) Group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

(ii) Discrimination against any person or group of persons, provided, however, that with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced after consultation with the mayor. Upon its own motion, to make, sign and file complaints alleging violations of this chapter.

(b) In the event that any investigation undertaken pursuant to paragraph a of this subdivision discloses information that any person or group of persons may be engaged in a pattern or practice that results in the denial to any person or group of persons of the full enjoyment of any right secured by this chapter, in addition to making, signing and filing a complaint upon its own motion pursuant to paragraph a of this subdivision, to refer such information to the corporation counsel for the purpose of commencing a civil action pursuant to chapter four of this title.

§ 8-117 Rules of Procedure. The commission shall adopt rules providing for hearing and pre-hearing procedure. These rules shall include rules providing that the commission, by its prosecutorial bureau, shall be a party to all complaints and that a complainant shall be a party if the complainant has intervened in the manner set forth in the rules of the commission. These rules shall also include rules governing discovery, motion practice and the issuance of subpoenas. Wherever necessary, the commission shall issue orders compelling discovery. In accordance with the commission's discovery rules, any party from whom discovery is sought may assert an objection to such discovery based upon a claim of privilege or other defense and the commission shall rule upon such objection.

§ 8-119 Hearing.

g. The commission shall not be bound by the strict rules of evidence prevailing in courts of the state of New York. The testimony taken at the hearing shall be under oath and shall be transcribed.

§ 8-126 Civil penalties imposed by commission for unlawful discriminatory practices.

a. Except as otherwise provided in subdivision thirteen of section 8-107 of this chapter, in addition to any of the remedies and penalties set forth in subdivision a of section 8-

120 of this chapter, where the commission finds that a person has engaged in an unlawful discriminatory practice, the commission may, to vindicate the public interest, impose a civil penalty of not more than fifty thousand dollars. Where the commission finds that an unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act, the commission may, to vindicate the public interest, impose a civil penalty of not more than one hundred thousand dollars.

§ 8-105 Powers and duties. The powers and duties of the commission shall be:

(1) To work together with federal, state and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York, and engage in other anti-discrimination activities.

Omitted

(4) (a) To receive, investigate and pass upon complaints and to initiate its own investigations of:

> (i) Group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

(ii) Discrimination against any person or group of persons, provided, however, that with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced after consultation with the mayor. Upon its own motion, to make, sign and file complaints alleging violations of this chapter.

ABA Model Canons of Professional Conduct

Canon 5. A Lawyer should exercise independent professional judgment on behalf of a client.

Ethical Considerations

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free of any potential conflict and to obtain other counsel if the client so desires. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict, and should accept or continue employment only if each client consents, preferably in writing. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, the lawyer should also advise all of the clients of those circumstances.

EC 5-21. The obligation of a lawyer to exercise professional judgment solely on behalf of the client requires disregarding the desires of others that might impair the lawyer's free judgment.

EC 5-23. A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals

without regard to the professional responsibility of the lawyer to an individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may see, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of professional freedom.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FORMAL OPINION 1987-3

COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

April 30, 1987

ACTION: Formal Opinion

OPINION:

Lawyer X, a staff attorney at a government agency which receives, investigates and prosecutes complaints of employment discrimination, has learned from a complainant, after a probable cause finding of discrimination was issued by the agency, information that would, if an attorney-client relationship existed, be protected as a confidence or secret and that is likely to be materially adverse to the complainant's case.

Lawyer X asks (i) whether he has the ethical obligation, when acting as counsel for both the complainant and the agency (a dual relationship created by statute), to disclose the materially

adverse information to the attorney for the employer and (ii) whether he has the ethical obligation, when acting as counsel for only the agency, to disclose the information to the employer. We answer the first inquiry in the negative and the second inquiry in the affirmative, subject to the conditions discussed below.

I. The First Inquiry

When by statute Lawyer X is counsel for both the complainant and the agency, the Committee is of the opinion that he does not have the ethical obligation to disclose the materially adverse information to the employer's attorney, provided that, in so doing, Lawyer X is not required to make any misleading or false representations to the Tribunal. The complainant confided to Lawyer X in the course of the attorney-client relationship and, as a result, the information should be maintained, in most cases, in confidence by Lawyer X.

A. The New York Code of Professional Responsibility requires that a lawyer preserve the confidentiality of a client's "secrets" and "confidences" and prohibits the lawyer's "use [of] a confidence or secret of his client to the disadvantage of the client." DR 4-101(B)(1), (2). A "confidence" refers to information protected by the attorney-client privilege and a "secret" is defined as:

other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client.

DR 4-101.

The lawyer's duty to maintain the confidentiality of a client's communications is one of the most solemn and significant governing attorneys, including those communications which, if disclosed, would be detrimental to the client's case or subject the client to liability. See, e.g., N.Y. City 1986-7; N.Y. City 1986-8; N.Y. City 82-17 (the communications by a client to his attorney that he made misrepresentations to the

opposing party prior to his lawyer's retention "are protected as 'secrets' under the Code since they are information gained in the professional relationship that would be embarrassing or harmful to the client if disclosed."); N.Y. City 82-39 ("A lawyer may not disclose information received during an initial consultation with a potential client who revealed that she has previously embezzled funds"); see also N.Y. State 525 (1980).

While the Code requires a lawyer to preserve the confidences of his client, the Code also places a special duty on government lawyers to act justly and to ensure that a full record is developed:

A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlement or results.

EC 7-14.

The Committee is of the opinion that EC 7-14 does not, however, require a government lawyer who also represents a private citizen in civil actions or administrative proceedings to disclose confidential communications to the adversary. In these circumstances, the government lawyer is not functioning primarily on behalf of the sovereign as does a prosecutor. Instead, the lawyer's obligations to the individual client are paramount, thus requiring the lawyer to preserve the confidences and secrets of the client.

In that light, a recent opinion issued by the Bar Association of Nassau County, although not directly on point, is instructive. There, the Association found that an attorney, who worked for a not-for-profit public interest organization, which paid the lawyer's fees and provided cost-free legal services to the public, was not required to disclose the client's confidences to either the organization or to his adversary. The Association stated:

[The attorney] owes a duty of confidentiality to the client, and such representation takes priority over the attorney's duties to the employer. The party who is rendered legal services, rather than the party who pays the legal fees, is the client . . . [In view of] the attorney's duty to maintain the confidentiality and secrets of his client, [he] should seek to quash [a] subpoena [served by his adversary].

Nassau Cty. Ops. 82-5, 82-6.

B. The Committee is of the opinion, however, that where the failure to disclose the materially adverse information would, directly or indirectly, and in light of the circumstances, mislead the Tribunal, then Lawyer X should seek his client's consent to disclose the information.

DR 7-102(A) states in part:

In his representation of a client, a lawyer shall not . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal; (4) Knowingly use perjured testimony or false evidence; [or] (5) Knowingly make a false statement of law or fact.

These provisions reflect the principle that affirmative misrepresentations, or representations that are misleading in light of the circumstances, should not be made to the Tribunal. Lawyer X may not therefore withhold the information from the Tribunal if nondisclosure would be false or misleading under the circumstances and should therefore seek to obtain the consent of his client to disclosure. If counsel does not receive such consent, he should seek permission to withdraw. n1

n1 See N.Y. County 106 (1916) (lawyer should decline employment if he would otherwise have to conceal facts from the court about the existence of a prior divorce decree).

The Committee is of the opinion that the exception engrafted upon DR 7-102(B)(1) of the Code n2 does not relieve an attorney of the obligation, in a civil case, to be candid with the Tribunal if asked, directly or indirectly, about the subject

matter of the confidence or secret, or if something said at the hearing or trial would be misleading if the information were not disclosed. Accordingly, if consent to disclose under these circumstances cannot be obtained, counsel, as noted above, should withdraw. n3

n2 DR 7-102(B)(1) states (emphasis supplied):

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

n3 The opinion in N.Y. State 454 (1976) is instructive. There, it was held that a lawyer who had withdrawn from the representation of his client did not have the ethical obligation to disclose that his client had concealed assets which should have been turned over to a trustee in a bankruptcy proceeding. While it is not clear from the opinion whether the lawyer was faced with making affirmative misrepresentations or misleading statements to the Tribunal, the attorney apparently withdrew when consent could not be obtained from his client to disclose his client's actions.

II. The Second Inquiry

The Committee's response concerning this aspect of the inquiry is premised on the assumption that it is fairly understood by the parties that Lawyer X was acting as counsel only for the agency. Where Lawyer X makes affirmative representations, or otherwise communicates to the complainant, that he is acting only on behalf of the agency, and not as counsel for the complainant, then the communications to Lawyer X are not privileged. See United States v. Demauro, 581 F.2d 50, 55 (2d Cir. 1978). In this situation, Lawyer X's ethical obligation, as a government

lawyer, to develop a "full and fair record" and "to seek justice", should prevail. n4

n4 The government lawyer's ethical obligation to assist the Tribunal in the search for justice is well settled and requires the government lawyer, in an appropriate case, to take actions which are detrimental to his position or even to dismiss the action if it is deemed wholly to lack merit. See DR 7-103(B) (government lawyer in criminal case has duty to disclose to defendant exculpatory evidence); Jones v. Heckler, 583 F. Supp. 1250 (N.D. Ill. 1984) (court stated that it would have been professionally responsible for the government attorneys to submit "a confession of error" in the lawsuit considering the feeble support for the government's case); Amato v. Krob, slip. op. (Ohio Ct. App., 8th Dist., Sep. 8, 1983) (counsel for the City's safety director "should not decline to assist the Commission in complying with appellate procedures, even if his silence benefits his government client.").

However, the Committee is of the opinion that where it is clear, based upon the facts and circumstances, that the complainant views Lawyer X as his counsel for purposes of representation in the discrimination case, and Lawyer X acts accordingly, the materially adverse information was communicated by the complainant to Lawyer X within an attorney-client relationship and should not be disclosed, see In re Grand Jury Proceedings, Detroit, 434 F. Supp. 648, 650 (E.D. Mich. 1977), aff'd, 570 F.2d 562 (6th Cir. 1978).

The foregoing is subject to the limitation, discussed in Part I.B above in connection with the first inquiry, that misrepresentations or misleading statements need not be made to the Tribunal. In that circumstance, the Committee's opinion is that counsel for the agency should withdraw, see DR 2-110(C)(1)(b), and no new counsel employed by the agency should be substituted. We realize that such a conclusion would require the complainant to retain private counsel to prosecute his discrimination case, or in some instances, would require the complainant to appear pro se. This result is compelled, however, by the irresolvable conflict between the competing

duties of Lawyer X -- a conflict created by the complainant's own conduct.

For the foregoing reasons, the Committee answers the first inquiry in the negative and the second inquiry in the affirmative, subject to the conditions described herein.

CITY UNIVERSITY OF NEW YORK BYLAWS

Section 1.10. PUBLIC HEARINGS.

a. The board shall schedule public hearings on the adoption of its expense budget, capital budget, and master plan. The board in the exercise of its judgment may schedule such other hearings as it may determine.

b. The board shall hold a public hearing on the agenda of a regular meeting no less than three days before the meeting. Upon notification received by the secretary one day in advance of the hearing, persons will be permitted to speak to items on the agenda and to submit written statements relating thereto. The chairperson, or the vice chairperson in the chairperson's absence, shall assign one or more board trustees to conduct such hearing. A substantive summary of written statements received at such hearings shall be distributed to the trustees of the board prior to the regular meeting.

Section 5.2. WAIVER OF THE BYLAWS.

Any provision of these bylaws may be waived at any meeting of the board for some special purpose by the affirmative vote of nine trustees of the board

Section 9.1. DEPARTMENT ORGANIZATION.

a. Each department, subject to the approval of the faculty or faculty council, where existent, and subject to the provisions of other sections of these bylaws, shall have

control of the educational policies of the department through the vote of all of its members who have faculty rank or faculty status; and if the department so desires, it may enfranchise persons in visiting professorial titles and other members who have been appointed on an annual salary basis for a first or second year of full-time service to vote on departmental matters except for the election of department chairpersons, departmental committee on personnel and budget, or departmental committee on appointments. Each department shall cooperate with related departments and with college agencies in general in the development of college-wide interests.

b. The executive officer of the department shall be the department chairperson who shall be a professor, associate professor or assistant professor elected by secret ballot for a term of three years, except as provided below, by a majority vote of all the members of the instructional staff of the department who have faculty rank. Proxy or mail voting shall not be permitted. The department chairperson must be tenured or have been approved by the board for tenure at the time of his/her election, except in departments less than seven years old. Such elections shall be subject to the subsequent approval of the president and the board. The present system of staggered departmental elections shall be continued. The successors of department chairpersons shall be elected during the first full week in May at the expiration of the respective terms of office to take office as of July first of the year in which they are elected and at the three year intervals thereafter. Vacancies shall be filled by election for the unexpired term. Notwithstanding anything in the foregoing to the contrary, in the library department, the president of the college shall from time to time recommend a member of the department to the board for designation as chairperson. Department chairpersons who are not tenured professors, associate professors or assistant professors on January 1, 1976 may

fill out their unexpired terms as chairpersons, subject to the provisions of sections 9.1. (c) and 9.6. (a) of these bylaws.

c. In any case where the president does not approve the election of a department chairperson, or at such other time as the interests of the college may require the removal of a chairperson and the appointment of a new one, he/she shall confer with the department and thereafter shall report to the board any subsequent action by the department with respect thereto, together with his/her own recommendation for a chairperson. The recommendation by the president to the board for the designation of the department chairperson should take place only after careful consideration by the president of the qualifications of those selected by the respective departments. The president shall base his/her recommendation on the capacity of the individual selected to act effectively as the departmental administrator and spokesperson and as a participant in the formation, development, and interpretation of college-wide interest and policy.

Section 9.3. DUTIES OF DEPARTMENT CHAIR-PERSON.

a. The department chairperson shall be the executive officer of his/her department and shall carry out the department's policies, as well as those of the faculty and the board which are related to it. He/she shall:

   1. Be responsible for departmental records.

   2. Assign courses to and arrange programs of instructional staff members of the department.

   3. Initiate policy and action concerning the recruitment of faculty and other departmental affairs subject to the powers delegated by these bylaws to the staff of the department in regard to educational policy, and to the appropriate departmental committees in the matter of promotions and appointments.

4. Represent the department before the faculty council or faculty senate, the faculty, and the board.
5. Preside at meetings of the department.
6. Be responsible for the work of the department's committee on appointments or the department's committee on personnel and budget which he/she chairs.
7. Prepare the tentative departmental budget, subject to the approval by the department's committee on appointments or the department's committee on personnel and budget.
8. Transmit the tentative departmental budget to the president with his/her own recommendations.
9. Arrange for careful observation and guidance of the department's instructional staff members.
10. Make a full report to the president and to the college committee on faculty personnel and budget of the action taken by the department committee on personnel and budget or department committee on appointments when recommending an appointee for tenure on the following:
    a. Teaching qualifications and classroom work.
    b. Relationship of the appointee with his/her students and colleagues.
    c. Appointee's professional and creative work.
11. Hold an annual evaluation conference with every member of the department after observation and prepare a memorandum thereof.
12. Generally supervise and administer the department.

Section 9.7. APPOINTMENTS.

a. Recommendations for appointments in a department shall be initiated (1) by the department or (2) to a professorial title by the president pursuant to his/her responsibilities in accordance with section 11.4. of these bylaws. The president may recommend that such appointee be designated as department chairperson. Such recommendation by the president for appointment and designation as department chairperson may be made either at the time of election of department chairperson or at such other time as the educational interests of the college may require. Before recommending such appointment or designation, the president shall confer with the members of the department and with the college committee on faculty personnel and budget.

Section 11.4 THE PRESIDENT. A. Position Definition: the president with respect to his educational unit, shall:

a. Have the affirmative responsibility of conserving and enhancing the educational standards and general academic excellence of the college under his/her jurisdiction. Such responsibility shall include but not be limited to the duty to recommend to the board for appointment, promotion, and the granting of tenure only those persons who he/she is reasonably certain will contribute to the improvement of academic excellence at the college. These recommendations shall be consistent with the immediate and long range objectives of the college.

b. Have the power (1) to remove a department chairperson in accordance with section 9.1c; and (2) to initiate recommendations for appointment in a department to a professorial title in accordance with section 9.6a.

c. Be an advisor and executive agent of the board and have the immediate supervision with full discretionary power to carry into effect the bylaws, resolutions and policies of the board, the lawful resolution of any of its committees, and

the policies, programs and lawful resolutions of the several faculties and students where appropriate.

d. Exercise general superintendence over the concerns, officers, employees and students of his/her college, prepare and implement the college master plan.

EX PARTE CONFERENCE TRANSCRIPT

Court: Did you all move for summary judgment with respect to ---- I think I know your answer ---- with respect to the '91 retaliation claims? And the answer is no, you didn't because you didn't have time to, right?

Banks: Correct. They were really part of the case, to my knowledge, until ----

Court: Until they became part of the case.

Banks: ---- the motion for reconsideration. And, therefore, we did as good of a job as I could in the motion *in limine.*

Banks: Right.

Court: What I'm thinking about is to request a proffer by way of summary judgment, but a proffer as to the proffer with respect to the '91 retaliation claims before we get a jury. I mean I see sort of a procedural problem, but we all know how this came to pass. And it seems to me that that would be, that might be appropriate. I don't know whether you have ---- you all might want to think about the procedural setting in which we find ourselves. But the other thing I might do would be to defer the jury, the '91 retaliation in order to give you time to make a motion for summary judgment with respect to that.

Banks: We would welcome that opportunity.

Court: Well, I'm sure you would. I'm just thinking about the procedural situation which is of my own making, obviously, I don't think a motion *in limine* does it for a cause of action is really what I'm trying to say. Maybe that would be the better way to go about it. That means briefing and all that. Why don't you give some thought as to ---- I'm sure we're not going to find a procedural answer. I don't see how, except maybe to put it over and then give you an opportunity to move to dismiss those claims on the summary judgment basis.

Banks: Your Honor, we would welcome that opportunity.

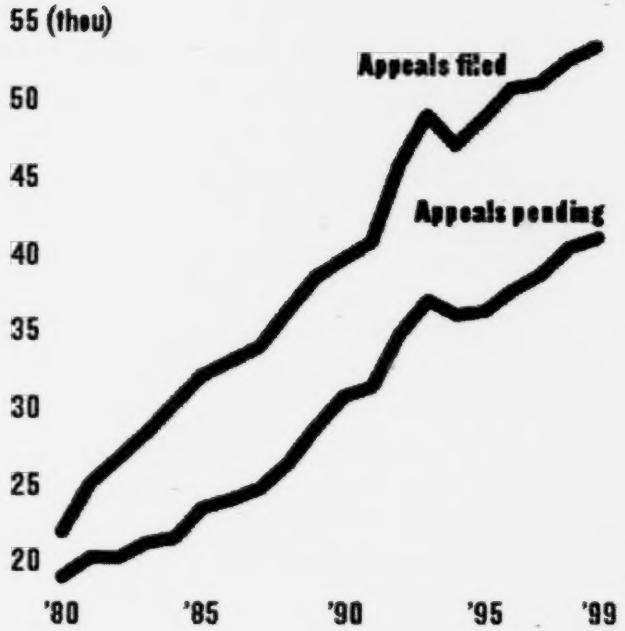
Tr., Vol. 2, p. 207, line 25 to p. 209, line 22.

Forbes Magazine, *Justice in The Dark*, October, 30, 2000

Appeals courts are giving short shrift to cases-and not just frivolous ones.

79% of almost 27,000 federal appeals decided on merits last year;
24% of the 1998 cases close enough that a judge wrote a dissenting opinion;
37% of cases that reversed the trial court, a sign the law wasn't clear.
43% of cases in the New England circuit, and Puerto Rico.
90% of cases in the circuit including maryland, virginia, the carolinas.

Unpublished decisions haven't reduced the backlog, and the number of appeals continues to rise.



THREE YEARS AGO A FEDERAL jury acquitted Vicki Lopez-Lukis, a former commissioner in Lee County, Fla., of bribery for letting her lover, a Goldman Sachs lobbyist, reimburse her for their personal phone calls. But, bizarrely, the jury convicted her of one count of using the mails to deprive her constituents of "honest services" in connection with the same alleged bribery. This didn't make any sense, so she appealed to the 11th Circuit Court of Appeals. But in a one-word decision--"affirmed"--the appeals court rejected her argument.

Blind justice? For Lopez-Lukis, more like justice in the dark. She has no idea what the appellate judges were thinking when they brushed aside the obvious inconsistency in the verdict. Forget further appeals. The Supreme Court rarely accepts cases for review--only 124 of 8,445 sent to it in the 1999-2000 season--and almost never accepts one if there is no published opinion to look at. Lopez-Lukis is serving a 27-month term in Coleman federal prison near Orlando.

Last year federal appeals judges disposed of 79% of the 26,819 cases they decided by issuing so-called unpublished

decisions, up from 37% in 1977. Over 7% of the unpublished decisions consisted of a single word. Whether curt or long-winded, an unpublished decision isn't precedent. That means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings.

"This is judges disobeying the law," says William Richman, a University of Toledo law professor who has studied the problem.

At last, one federal appeals court has declared war on the practice. In August, in a case involving a late-filed tax refund claim, a three-judge panel in St. Louis, Mo. branded unpublished decisions unconstitutional. Despite the ruling, the taxpayer lost her refund.

The reasoning behind this momentous decision was that judicial decisions are intended not just to resolve particular disputes but also to tell Americans what the law is. So every decision must be a precedent. Though that decision is itself a precedent only in the 8th Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska and the Dakotas), litigants in other federal courts are starting to cite it. The Supreme Court will likely end up ruling on the matter.

The shortcut system began in the late 1960s when judges were struggling to deal with an avalanche of social-justice litigation as well as a parade of *pro se* litigants from the jailhouse. True, the appellate backlog does get scary at times. But does this justify lazy law? "[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit on the West Coast, though he contends that they are still sound.

Judges insist that they issue unpublished decisions only in simple, noncontroversial cases, where the answer is clear cut. The statistics say otherwise. Appeals courts issue unpublished decisions in 24% of the cases where various judges disagree so much that one writes a dissenting opinion, and in 37% of the cases where they're reversing the trial court.

The 9th Circuit Appeals Court recently saw proof that unpublished decisions mask plenty of inconsistency. The court had affirmed the conviction of Pablo Rivera-Sanchez, an

illegal alien who sneaked back into the U.S. after being deported. His lawyer found, though, that the court had in the past issued 27 separate unpublished decisions applying three different rules to the same immigration issue.

Consider how unpublished decisions have nearly driven out of business Beehive Telephone, a Wendover, Utah-based rural phone company. Last year the Federal Communications Commission cut Beehive's rates by 66%. An appeals court, swayed by the FCC's claim that Beehive had made a procedural error that barred appellate review, refused to hear the case.

Beehive lawyer Russell Lukas dug up an earlier decision by the same court that said even if a company makes that error--which he insists Beehive did not--it doesn't disqualify an appeal. But Lukas couldn't cite one of the key cases--it was deemed unpublished. Completing the insult, the appeals court ruled against Beehive in another unpublished decision only one word long. "They can't justify what they're going to do, so they don't publish it," says Lukas, who works out of Washington, D.C. He asked the Supreme Court for review, but naturally, was denied.

Alcan Aluminum, the Ohio subsidiary of the Canadian-based giant Alcan Aluminium Ltd., was the victim of a court's unpublished opinion that directly contradicted its earlier decision in the same case. A federal court in Philadelphia held Alcan liable in 1991 for part of the cost of cleaning up Pennsylvania's Susquehanna River after a spill. An appeals court kicked the case back to the lower court, saying in a published decision that Alcan would be off the hook if it could show that its emulsion hadn't caused the pollution. Though Alcan proved that its waste hadn't caused the harm, the lower court still found it liable, applying a new and impossibly high standard. The company appealed again, to the same appellate court, but this time the judges batted it down with one of those one-word grunts. Penalty, $500,000.

There are better ways to deal with backlogs. Congress might appropriate the money to pay for more judges. Or

perhaps shrink the overpowering role of federal law in our lives.

City of New York
COMMISSION ON HUMAN RIGHTS
40 Rector Street, New York, NY 10006

MEMORANDUM

To: File
From: Matthew Nowkowski, Human Rights Specialist
Subject: Case Summary
Dianne [sic] Sank v. CUNY/City College of New York
Bernard Harleston, President
EM00457-08/24/88-DE, as amended
Date: July 24, 1991

SUMMARY OF THE COMPLAINT

Complainant, who is female, white and a victim of retaliation charges Respondents with discriminatory practices with regard to employment.

Specifically, Complainant alleges that she was denied equal terms and conditions of employment and removed as department chairperson due to discriminatory reasons based upon her sex, race and color and due to retaliation.

SUMMARY OF THE RESPONSE

Respondents deny Complainant's charge of discriminatory practices. Further, Respondents assert that Complainant's sex, race and color were not factors in her removal as department chairperson. Respondents deny Complainant's allegations that she has been retaliated against for having opposed Respondents' practices.

SUMMARY OF THE INVESTIGATION

The investigation consisted of a review of documentation submitted by both parties, interviews of Complainant and witnesses

and a fact-finding conference. The complaint was filed October 21, 1988 and amended three times.

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Complainant alleges and Respondents admit that she is a faculty member at the Department of Anthropology of Respondent City College. In or about May, 1987, Complainant was elected department chairperson effective July 1, 1987. Complainant alleges and Respondents admit that on or about April 27, 1988, she received a letter from Respondent Harleston, non-white and male, removing her as the elected chairperson effective June 1, 1988. This letter informed Complainant that her removal was "in the interests of the college."

Complainant alleges that the administration, even though it was made aware of and had knowledge of the maladministration of her predecessor (a male) did not admonish him or remove him as the department chairperson.

Respondents deny the above-stated allegation. The investigation revealed that there was an Outside Review Committee (ORC) that reviewed the anthropology department at the behest of the administration. The ORC issued a report which specifically outlined the maladministration of Complainant's predecessor. Moreover, the ORC noted that the administration was aware of the problems and maladministration of the former chair. However, the former chair (male) was not removed and Complainant was removed. It should be noted that Complainant was never accused of maladministration; nor was she accused of malfeasance during her tenure as a chair.

Complainant alleges that upon information and belief, the President has not removed similarly situated male department chairpersons even though their departments received negative evaluation from the ORC.

Respondents deny the above allegation. Respondents "affirmatively state that since the inception of City College's outside review process of its departments in 1987, no department review has resulted in the recommendation that a department chair be removed except for the instant case" (see Respondents' Answer, paragraph 5).

The investigation showed that Complainant was the only chair removed as a result of the ORC process. However, this investigator reviewed the findings of ORC reviews of several departments and many were critical of the various department

chairs, (see memo to file). Further, Professor John Dean of the Architecture Department was removed by the President in 1982, Mr. Dean was afforded the opportunity of resigning before an official removal by the President. The ORC report regarding-the anthropology department also called for the removal of the department secretary (female). This recommendation was not followed which may indicate that the President had discretion regarding implementing the ORC reports. A review of the ORC report for the computer science department shows that although

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there was not a recommendation to remove the chairperson, a number of faculty asked the President to remove a duly elected chairperson. The President refused this request.

Complainant alleges that the acting department chairperson appointed to replace her is a black male. Upon information and belief, two female candidates who were suggested and are both better qualified, were not interviewed and considered for the acting chairperson position. Affirmative action procedures require proper advertising for all positions and Complainant alleges that these procedures were not followed.

Respondents admit that a black: male wad appointed to replace Complainant. Respondents assert that a majority of the anthropology faculty recommended Complainant's successor, Dr. Jones. Further, Respondents state that affirmative action procedures are not required to fill interim positions.

The investigation shows that Complainant was replaced by a black male, Dr. Jones, of the CUNY Graduate Center. Further, a search was conducted and ultimately, a white female was hired as the department chair. In normal hiring situations, CUNY follows affirmative action procedures when filling positions. These procedures were not followed when Dr. Jones was appointed. The three candidates included Dr. Jones and two white females. The President stated, at the Commission fact-finding conference, that he did not interview the two white females, but decided to appoint Dr. Jones because he was available.

Complainant alleges that the President refused and failed to accord her equal privileges of office as are accorded similarly situated male department chairpersons. In or about February and March, 1988, the President denied Complainant's requests for a meeting and he denied the college Ombudsman's request for a meeting.

Respondents deny the above allegation and state that the President and administration were aware of Complainant's views regarding her removal as chairperson.

The investigation reveals that the Ombudsman, Bruce Newling, wrote a letter, dated May 11, 1988, chastising the President for failing to meet with him and Complainant regarding her removal. The President also admitted that he failed to meet with Complainant about her removal. This is in contrast to the situation concerning Professor John Dean. Dean Morris Silverberg informed the investigator that the President met with John Dean to work out a "deal" so he could resign as head of Architecture; thus, sparing John Dean the negative impact of a forced resignation.

Complainant alleges that contrary to the standard practice of referring to elected department heads as "chair" or "chairperson," the President unmasked his bias towards females by

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consistently referring to Complainant's position as "chairman" in his correspondence with Complainant, her department and with the University Chancellor (plus omitting Complainant's name from the latter's correspondence).

Respondents deny Complainant's allegation and state that there is no established policy regarding the usage of "chairman" or "chairperson."

Complainant submitted documents which shows that she was addressed as "chairperson" by members of the faculty and administration except for the President. Letters directed to Complainant and signed by the President specifically use "chairman." Although it is more accepted to use a genderless form of address, the President was not violating Respondents' policies in using "chairman." The investigation was not able to substantiate Complainant's charge that this is a deliberate and premeditated form of sexism.

Complainant alleges that upon information and belief most permanent appointments by the President during his tenure have been males and there has been very few appointments of females to administrative positions.

Respondents deny the above allegation and assert that the President appointed several females to high administrative posts.

The investigation relied on a list of appointees submitted by Complainant because Respondents were not able to produce a complete and accurate list of presidential administrative

appointments due to staffing constraints. Basically a review of the President's administrative appointments shows that of the permanent appointments 77% were male and 23% were female. Acting (temporary) appointments consisted of 80% males and 20% females. The aforementioned statistics represent appointments made during 1987-1989 and are shown in the college's catalog. The investigator secured a copy of an affirmative action report written by the former director of affirmative action. The report was issued in 1985 and specifically addresses the problems of recruitment and appointment of qualified females at CCNY. CCNY is compared to other colleges in the CUNY system and lags significantly in the appointment of females to positions of authority in the administration.

FIRST AMENDED COMPLAINT

Complainant alleges that the acting department chairperson appointed to replace her is a black male. This allegation was previously discussed, supra.

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Complainant alleges that upon information and belief, most permanent appointments by the President during his tenure have been black males.

Respondents deny the above allegation and affirmatively state that Complainant's election as chairperson was approved by the President in May, 1987.

The investigation reveals that during the specific time of the complaint (1987-1989) the President appointed 12 black males to permanent positions in the administration and 8 white males. The statistics are lower for permanent administrative posts for females: 1 black female was appointed, as well as 5 white females.

Complainant alleges that upon information and belief, the President has a publicly stated policy of bias in favor of black males.

Respondents deny the above allegation and assert that "the President's policy with regard to recruitment and employment at City College is that expressed in the City College Equal Opportunity Policy statement" (see Respondents' Answer).

The investigation shows that one of the President's commencement speeches stated that the education of black males is one of the most important responsibilities of CCNY. It appears that Complainant may have interpreted this speech as a policy statement

regarding the hiring, retention and appointment of black males to positions of authority within the administration.

SECOND AMENDED COMPLAINT

Complainant alleges that in or about May, 1989, she was denied a request for a one semester leave with pay. According to her union contract, she should have been afforded "special consideration" for leave, since she has not taken leave in 21 years. Upon information and belief, the President was influential in the denial of her leave request.

Respondents admit Complainant's charge that her leave request was not approved and deny that the President was influential in the decision to deny her leave.

The investigation shows that under the contract between the faculty and CCNY, paragraph 25.5 states that: "Special consideration shall be given to those applicants who have not had a sabbatical leave or fellowship in fourteen (14) or more years," The investigator interviewed Professor Besmer, who was acting chairperson subsequent to the tenure of Professor Jones. He also served on the committee which reviewed Complainant's application for a leave. He states that the Complainant's leave proposed was not as compelling as the others which were submitted. However, Complainant counters that Besmer was one of the faculty who

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applauded her dismissal as chairperson; therefore, his testimony is tainted. Professor Besmer did not refer to Complainant having received "special consideration" because of her many years of service without requesting a leave. Further, it appears that the President was not directly involved in the decision to grant a full-pay leave. There is only circumstantial _____ with the denial of leave and Complainant having filed her complaint and the amendments thereto.

Complainant alleges that on or about July 27, 1989, she discovered that her research lab was going to be moved to another room. This move was supposed to be carried out from July 21 through July 24, 1989. On or about July 28, 1989, Complainant discovered that her lab had been packed and moved to a storage room. Complainant alleges that she was not informed of this move in a timely manner and upon information and belief, the President was responsible for the decision to move her lab. As a senior, tenured, full-professor, Respondents should have made every effort

to accommodate Complainant's research work and notify her in a proper way of the removal of her lab.

Respondents deny any knowledge of when Complainant may have been notified about the moving of her lab and assert that efforts were made to accommodate Complainant. Respondents deny that retaliatory animus was the motivating factor in its decision to relocate Complainant's lab.

Complainant submitted the letter and envelope she received notifying her of the removal of her lab. Although the letter was dated July 20, 1989, the envelope was postmarked July 27, 1989. Complainant's lab was moved prior to July 27, 1989. However, the investigation was unable to ascertain the exact date of the move. According to Respondents, the workers involved in the move took pictures of Complainant's lab and made entries into a journal titled "mover's log." However, Respondents did not produce the log or the photographs because they were "lost." One of the workers involved in the move informed the CCNY faculty senate that he had never photographed a move at CCNY until the removal of Complainant's lab. Further, Respondents state that Complainant's lab was taken to provide the computer science department with two contiguous spaces. This reasoning is not supported by the chair of the computer science department: he informed the investigator that he was shown other non-contiguous rooms and had approved them. Later, in or about June or July, 1989, Vice-President Rodriguez decided that instead of non-contiguous rooms, the computer science department would receive Complainant's lab and an adjacent classroom. Further, the planning committee issued a list of space to be reallocated at CCNY at the termination of the spring, 1989 semester. Complainant's lab (room 7105) was never listed as a space to be reassigned. Respondents argue, interalia, that Complainant was not using her space and the equipment therein was boxed. Complainant counters that hers was an active lab; continual theft required her to keep her work in boxes. Regarding the issue of

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notice, Complainant maintains that she was home during the summer break and could have been reached by telephone. Complainant states that she never received a telephone call. It appears that no other senior, tenured professors have had their labs moved at Respondents' facilities, without their knowledge and consent.

Complainant alleges and Respondents admit that on or about July 31, 1989, she discussed the moving of her lab with Vice-President Rodriguez. Mr. Rodriguez refused to give Complainant her lab, nor would another location be considered.

THIRD AMENDED COMPLAINT

Complainant alleges that in or about September, 1989, Respondent Chair Fremont Besmer, male, informed her by memo that she had to transfer her research computer to the department. Upon information and belief, Respondent Besmer wants Complainant' 5 computer for his own personal use.

Respondents deny the above allegation and assert that Complainant is not using the computer and the computer was not purchased with outside research funds. Further, Respondent Besmer asserts that the computer is targeted for use by the department's graduate students.

The investigation shows that, to date, Complainant has not surrendered the computer to the department. Complainant admits that the computer is not being used because of the disruption caused by the removal of her lab. Complainant maintains that the system was not purchased with tax levy funds. The discussion may be moot, since Complainant is still in possession of the computer. However, Complainant is adamant that it is further retaliation by the administration.

Complainant alleges that there is a computer in the anthropology department's office that is underutilized. The investigation revealed that the department received a new computer in or about 1990 and it is installed and in use.

Complainant alleges and Respondents admit that Respondent Besmer informed her that a consensus of the executive committee of the department decided to request the computer. Although Complainant denied that this is true, Respondents submitted information showing that a majority of the department's executive committee agreed, on two separate occasions, to request that Complainant return the computer.

Complainant alleges that Respondent Besmer has refused to request a computer from the Dean's office, even though several computers are available. The investigation revealed that as discussed, supra, the department was given a new computer in 1990.

Complainant alleges that upon information and belief, Acting Chair Besmer's attempt to take my research computer is way of expressing his gratitude and indebtedness to President Harleston, for the latter's role in appointing, affirming and retaining him as the interim/acting chair of the Department of Anthropology.

The College's January 13, 1988 Outside Review Committee's Report, which the College used to remove Complainant as Chair, strongly recommended that no one within the Department serve as Chair. However, Respondent Besmer was appointed Chair by the President, in direct opposition to the Committee's recommendations. Therefore, Complainant believes that the College's reason for her forced removal as chair is preteuxtural [sic] for discrimination, based upon her membership in a protected class.

Basically the above allegation is a continuation of previous allegations lodged by Complainant. Complainant was removed by the President under the pretext of a recommendation [sic] ORC that no one from the within the department could serve as chair. Complainant was replaced by a black male and he resigned. President Harleston appointed Respondent Besmer, a white male, who is a professor. Thus, Respondents contradicted their own stated reasons for removing Complainant as chairperson: that no one within the department could or should serve as chair.

CONCLUSION

The investigation uncovered evidence, based upon the testimony of Complainant and several witnesses, as well as documents submitted by both Respondents and Complainant, that supports Complainant's allegations that she was denied equal terms and conditions of employment, removed as chairperson and retaliated against due to discriminatory practices based upon her sex, race and color.

Complainant was elected chairperson of her academic department in May, 1987. Complainant's term of office commenced July 1, 1987 through June 30, 1990.

Complainant did not serve a full term. Complainant was removed from office by direct order of the President, who is a named Respondent. Respondents instituted a review of its academic departments by an Outside Review Committee (ORC). Complainant's department was reviewed in 1987 and ORC recommended that Complainant be removed, as well as the

departmental secretary, and a new chair be named from outside the college community.

The President removed Complainant via a letter that referred to her as "chairman." The President did not remove the secretary. Complainant was replaced by a black male professor, Dr. Jones, of the CUNY Graduate Center. Complainant was refused

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a meeting with the President and she was not allowed to resign her position as chairperson. This is in direct contrast to a male professor, Dr. John Dean, who was head of the architecture department. The President allowed Dr. Dean to resign his position and this was confirmed by Dean Morris Silverberg.

Dr. Jones eventually resigned his position as chairperson. The anthropology department was allowed to elect one of its own, Dr. Besmer, to the position of chairperson. Complainant protested this move because of the lack of a quorum and the President responded by appointing Dr. Besmer. This was in contradiction to the recommendation of the ORC and against Respondents' reason for removing Complainant from her position.

Complainant alleges that the President favors black males in his permanent appointments and this was substantiated by public information available through the college catalog. During the 1987-1989 academic years the President appointed 12 black males, 8 white males and 1 Asian male to permanent position. During the same time period, the President appointed 1 black female, 5 white females and 1 Asian female to permanent positions.

Complainant filed three amendments alleging several retaliatory acts for having filed the instant complaint. Complainant alleges that she was denied a paid leave request, even thought she was due "special consideration" because of her length of service. There is no evidence linking the President to this decision, which was made by an academic committee composed of her peers.

Complainant alleged that her research lab was moved without notice and her consent thereto. It appears that Complainant received a letter, postmarked July 27, 1989, informing her of this move. Complainant went to the college on July 28, 1989 and discovered that her lab had been moved. Respondents state that it was necessary to give computer science two contiguous rooms. However, the chairperson of computer science stated that such a request was never made and Complainant's lab was never under consideration until early in July, 1989. Moreover, the original

mover's log and photographs of Complainant's lab were lost and never presented to the Commission, even though they were requested. The workman who took the pictures informed the faculty senate that he had never been asked to photograph another room until the removal of the lab. Although the computer science department was to have contiguous space, a door was not opened after the removal of the lab. The removal of Complainant's lab appears to be a unique situation: no other senior professor was so treated.

Complainant alleges that her department requested her research computer, as further retaliation. The investigation was unable to link this alleged act of retaliation with the President, nor was the investigation able to show how the computer was purchased (i.e. tax levy funds or research funds). Complainant still retains the computer for research purposes.

Thus, based upon the above discussion, there appears to be credibility issues that can only be resolved in a law enforcement bureau initiated settlement or public hearing.

RECOMMENDATION

Probable Cause

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Letter from Harleston to Sank, dated April 27, 1998

CCNY SEAL

THE CITY COLLEGE
OF
THE CITY UNIVERSITY OF NEW YORK
CONVENT AVE. at 138 ST.
NEW YORK, NEW YORK 10031

BERNARD W. HARLESTON April 27, 1988
PRESIDENT
Professor Diane Sank
Department of Anthropology
The College

Dear Professor Sank:

This is to inform you than it has been decided to discontinue you designation as Department Chairman effective June 1, 1988.

After carefully considering the advice given to me by the members of the Department at our meeting on February 29, 1988, discussing the situation with the Executive Committee of the Faculty Senate and the Executive Committee of the Faculty Council (CLAS), and weighing all factors including the contents of the Outside Review of the Department, I have decided that it is in the best interests of the Department and The City College to replace you as Chairman, effective June 1, 1988. The authority to remove a chairman is vested in the President by the Bylaws of the City University of New York.

I shall also act to appoint Professor Delmos Jones as Acting Chairman, effective June 1, 1988. for the period extending through the academic year 1988-89. During this time we shall conduct a national search for a Chairman.

While I realize this decision may be a personal disappointment to you, I would like to thank you for your efforts during the year and trust that you will work cooperatively with Professor Jones and the members of the Department as we strive to make major improvements during the year ahead.

Sincerely yours,
/S/
Bernard W. Harleston

BWH/MS/es

cc: Provost A. Charlene McDermott
Dean Arlene McCord
Dean Morris Silberberg